SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 342.

MAPLE FLOORING MANUFACTURERS ASSOCIATION, W. D. YOUNG & COMPANY, MITCHELL BROTHERS COMPANY ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

APPELLANTS' SUPPLEMENTAL REPLY BRIEF.

JACOB NEWMAN,
CONRAD H. POPPENHUSEN,
HENRY L. STERN,
EDWARD R. JOHNSTON,
HENRY JACKSON DARBY,
Solicitors for Appellants.

INDEX.

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May it please the Court:

The Government withdrew its original Reply Brief and filed in lieu thereof a so-called "Substitute Brief" on Saturday, February 28, 1925—only two days before the cause came on for reargument. Within the short time at our

disposal it will be impossible to prepare a complete brief in reply to the Government's Substitute Brief. Therefore we are able only to present, by way of a supplemental brief, our reply to the new matter contained in the Government's last brief; and we respectfully ask the Court to consider, not only this supplemental brief, but also our Original Reply Brief as our reply to the Government's Substitute Brief. The Court will please bear in mind that this Supplemental Reply Brief undertakes to answer only certain portions of the Government's Substitute Brief, and that we rely upon our Original Reply Brief as a complete answer to the remainder of the matter contained in the Government's Substitute Brief.

Average Costs.

We wish especially to call the Court's attention to pages 172 *et seq.* of the Government's Substitute Brief, where it is contended that the increase in the prices of maple flooring during 1922 and 1923 was due solely to the fact that the defendant Association distributed from time to time certain average cost figures.

The proof with respect to the ascertainment of average costs was as follows:

> "These average costs are determined from time to time *whenever there are changes in the cost of rough maple lumber* * * * *and also whenever there are changes in the average manufacturing and marketing costs. We might issue one every two or three months, or oftener if there are violent fluctuations in the cost of rough maple lumber.*" (Vol. 1, pp. 155-6; see also p. 110.)

We pointed out in our Opening Brief that the average costs could not have been recommended prices, for the rea-

son that the proof showed that 1922 was a year of advancing prices (p. 346). Prices obtained by individual members reflected to some extent the increased costs of production far in advance of the ascertainment of average costs by the Association. This was natural, in view of the facts that the prices obtained were *constantly* subject to the influence of increasing actual costs *as well as to an increased demand for flooring,* whereas the average costs were ascertained by the Association at *irregular intervals and only after a marked advance* in the market price of rough lumber. *Prices obtained by individual members for flooring also reflected the combined judgment of both buyers and sellers—members as well as nonmembers—with respect to future conditions. Average costs, however, reflected only actually existing conditions with respect to manufacturing and marketing costs.* We also pointed out that the alleged uniformity of prices did not exist. (See Appendices T, U, and V, pages 24-64, Appendices to Appellants' Brief.) It was also demonstrated that the average costs were not and could not have been *minimum* prices, for the simple reason that the undisputed proof showed that the great majority of the sales were made at prices substantially below the average costs. Even a greater percentage of the total quantity of feet was sold at prices below the average costs. The Government now attempts to meet these incontrovertible facts by the following sophistries:

> "When the first cost price list—really a minimum price list—was distributed some were selling below and some above the prices designated therein. Those selling above were not expected to, and did not reduce their prices to conform to the list, but those sell-

ing below raised their prices, probably gradually, until practically all sales were made at or above the designated prices.

"In the meantime the competition to obtain higher prices than their competitors had caused many members to advance their prices. And when a large per cent of them had made a substantial advance a new list was distributed with prices at a higher level. Of course, while the prices of many then conformed to or exceeded these new prices, some were selling below them, and a short time would be required for the prices of all to be advanced to the new level. New lists would be distributed just as often as the market would stand the strain. Therefore uniformity in figures need not be expected. But we may expect to find that a large per cent of the sales were made at the designated list prices, as it is only the bolder ones who take the initiative in advancing prices, and the others will not follow until they ascertain that the ground is secure. Furthermore, it may be expected that a number of sales will be found below the list prices, but they will gradually decrease after a new list has been adopted until another advance is announced."

The fact is that the year 1922 marked a general recovery after the terrific slump in 1921 (Vol. I, pp. 165-6). The prices of all commodities were advancing. Rough maple lumber increased in price continuously throughout the year. Inasmuch as flooring and all other commodities had sold for more than their intrinsic values during the inflation period that culminated in 1920, they sold for less than their intrinsic values during the deflation period that ended in 1921. Prices of all commodities and wages generally increased during 1922 and the early part of 1923.

The Government's theory is that the "average costs" *alone* account for the increase in the price of maple flooring during 1922 and 1923. Of course such a theory is absurd, as we shall now show in detail.

As shown on Appendix E (p. 5, Appendices to Appellants' Brief) Clear grade maple flooring reached the peak price of $225 per M feet during the month of May, 1920, from which it fell to $76.92 per M feet during September, 1921; the No. 1 grade maple flooring sold for as much as $197.50 per M feet in June, 1920, and for as little as $50.19 in October, 1921; the Factory grade maple flooring sold as high as $168 per M feet during May, 1920, and as low as $16.17 per M feet in October, 1921.

Stocks on Hand (of 15 members) amounted to more than 29,000,000 feet during February, 1922. Unfilled Orders then amounted to only 8,000,000 feet. By June, 1922, Unfilled Orders amounted to more than 19,000,000 feet, whereas in February, 1923, they were more than 30,000,000 feet, which was not far from the record. Stocks on Hand had in the meantime declined to less than 22,000,000 feet (Vol. V, p. 955, Grant Keehn Ex. 22). This, too, despite the fact that the production (22 members) during 1922 was approximately 38 per cent greater than the production during 1921.[1]

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[1] PRODUCTION OF ASSOCIATION MEMBERS.

	Quantity.	Number of members reporting.
1922	148,313,000 ft.	22
1921	107,719,000 "	22
1920	129,523,000 "	21
1919	119,451,000 "	21

(Vol. IV. fol. p. 5506; Vol. II, pp. 770-1, 861-2.)

See page 21, Appendices to Appellants' Brief, for a graph showing the relation of the prices to demand (Unfilled Orders) and supply (Stocks on Hand). When the demand skyrockets and the supply (despite increased production) crumbles, of course prices rise. They did not greatly increase, as the graph shows, and as Mr. Grant Keehn explained (Opening Brief, pp. 221-6). The increase in price would be the natural consequence of the great increase in demand, even if the price of rough maple lumber had remained stationary. But rough maple lumber did not stand still.

As shown on Defendants' Exhibit PP (Appendix N, p. 18, Appendices to Appellants' Brief), the index number of the prices of rough maple lumber for 1920 was 358; for 1921 it was 179; for 1922 it was 187, and for the early part of 1923 it was 233. These figures are based on actual purchases made by Association members. See also Appendix O (p. 19 of Appendices to Appellants' Brief) for a graph comparing the index of the prices of "The Product" with the index of the prices of Rough Maple Lumber. This graph is explained on pages 218-219 of Appellants' Opening Brief.

Defendants' Exhibit CC½ (Appendix L, p. 16, Appendices to Appellants' Brief) shows that the following prices were obtained for rough maple lumber during January, 1922; December, 1922, and July, 1923:

	No. 1 common.	No. 2 common.	No. 3 A common.
January, 1922	$45	$30	$17
December, 1922	52	32	20
July, 1923	60	40	25

(P. 5 of Appendix L.)

The same statement also shows that the defendant J. W. Wells Lumber Company was during January, 1922, paying common labor in its flooring mill $2.50 per day. In August of 1922 it was paying $2.75 per day. In December, 1922, $3.00 per day; in March, 1923, $3.25 per day, and in May, 1923, $3.50 per day. The statement also shows that the same company (which was a producer of rough lumber) increased the pay of its men in the lumber camps from $26 a month and keep to $50 a month and keep.

The wage index of the defendant Cummer-Diggins Company was as follows:

1920	221
1921	153
1922	171
Part of 1923	195

(Appendix H, p. 9, Appendices to Appellants' Brief.)

The experience of all members, however, was not identical with respect to wages. The prices of mill supplies were also higher in 1922 than in 1921 (p. 11, Appendices to Appellants' Brief).

As Appendix F clearly shows (p. 7, Appendices to Appellants' Brief), the indices of "All Commodities Prices," of "All Building Materials Prices," of "Lumber Prices," as well as the index of the prices of "The Product," advanced throughout the year 1922 and into 1923. (See pp. 210-211 of Appellants' Opening Brief.)

And yet the Government has the hardihood to argue to this Court that the increase in the prices of maple flooring was due solely to the fact that the defendants distributed from time to time statements with respect to the average manufacturing and marketing costs!

The utter unsoundness of this contention is also demonstrated by the facts that each member ascertained his own costs; that the prices obtained by members varied widely; that each member fixed his own prices; that the prices were fair and reasonable; that the prices of nonmembers were generally higher than those of Association members; that buyers generally prefer to deal with Association members; that the Government did not produce a single dealer or consumer to testify that he had been oppressed by the defendants, and that dealers all over the country, as well as nonmembers, unanimously testified to the existence of vigorous competition, not only between members and nonmembers, but among the defendants.

It is a striking fact that the Government's theory, heretofore discussed, consists of hasty generalizations predicated solely upon the market of 1922 and 1923, which happened to be an advancing one. That the market prices are absolutely independent of the average costs issued by the defendant Association or its predecessors is conclusively proved by the market of 1920 and 1921, which happened to be a declining market. As shown by Appendix E, page 5, Appendices to Appellants' Brief, 13/16 x 2¼ Clear grade maple flooring dropped from $225 per M feet in May, 1920, to as low as $99.24 in December, 1920. During the same period the No. 1 grade dropped from $189.87 per M feet to as low as $84.35. The Factory grade dropped from $168 per M feet to as low as $53.13. The market continued to decline throughout the entire year of 1921; and during the times above mentioned the Associations then in existence, strange to relate, were issuing their tables of values. According to the theory of the Government, these tables of

values should have made such a drastic decline absolutely impossible.

It should be borne in mind that the Government in its petition does not rely upon the illegality of the plan outlined in the articles of association, but predicates its right to the relief sought upon the alleged results flowing from the operation of the plan (Vol. 1, pp. 10-11).

The petition alleges that the distribution of average cost figures, the use of the freight-rate book, uniform terms of sale, and uniform commissions have produced a practical uniformity of net f. o. b. mill and net delivered prices for maple, beech, and birch flooring, and that the distribution of trade statistics among the members of the defendant Association has eliminated competition. But the Government, *having offered no evidence to establish the alleged results of the defendant Association's activities, now falls back upon the plan itself as being unlawful per se* and practically rests its case upon the unwarranted assumption that this Court has held in the American Column & Lumber case, that the distribution of trade statistics is inhibited by the Anti-trust Act. As pointed out in our Opening Brief this Court did not so hold. In the last analysis the Government asks this Court to condemn the defendants' plan notwithstanding the fact that the Government offered no proof to establish the alleged harmful results of the Association's activities and notwithstanding the undisputed proof by buyers and witnesses produced by the Government that there exists strong active and vigorous competition among the defendants.

On pages 177-8 of the Substitute Brief appears the following rather curious specimen of reasoning:

> "To determine whether the so-called 'average costs' have been maintained as minimum prices, either of two methods could have been adopted for the purpose of comparing the prices actually obtained (as shown on the sales reports) with the so-called average cost; either the average cost *plus* the freight could have been compared with the delivered price reported (as was done on the sales reports during the operation of the January 6, 1921, Minimum Price Basis, as described heretofore on p. 39), or the delivered price reported *less* the freight could have been compared with the average cost. The Government chose the latter method, perhaps unfortunately, as the use of the former would not have given the appellants an opportunity to claim, as is done on pages 336-348 of their brief, *that the commission allowed, if any, should also have been deducted in order to arrive at the Cadillac base price.*"

Even if the former method had been used, it would still be necessary to determine what was the "delivered price" where sales were made at a price subject to commissions of $1.50, $2.00, or $3.00 per M feet or to a 5 per cent commission after the deduction of freight.

Furthermore, we have never contended that the commission allowed, if any, should be deducted "in order to arrive at the Cadillac base price." We insisted that when allowed, the commissions should be deducted in order to arrive at figures to compare with the average costs, or what the Government calls the "Cadillac base price."

We pointed out in our Original Reply Brief (pp. 64-70) that the Government's theory in the trial court as to why the commissions should be deducted was squarely opposed to the theory advanced by it in this Court. We are now

met with still other theories, as the following parallel columns prove:

Government's Original Brief.	*Government's Substitute Brief.*
"However, no contention can possibly be made that the delivered cost or price at any destination as given by the rate books and tables of delivered values, consists of the average cost, plus the average freight, plus the commission, as no reference to commissions is made in the present articles of association, or in their rate books or tables of values distributed during their operation." (P. 163.)	"(1) *The commission is actually embraced in the estimate of costs.* The questionnaire answered by the members, upon which answers the manufacturing and distributing costs are estimated, contains the following inquiry: '6. Selling expenses, including commissions and advertising and office expenses including selling administrative expenses.' And in compiling the answers to the questionnaire sent out in May, 1922, the average of the replies to this question was $3.75. (See p. 69.) The manufacturing and selling expenses added to the costs of rough lumber, including the waste, constitute the 'average costs,' which are shown in the rate books—and the estimates of costs which are from time to time distributed." (Pp. 178-9.)

The Government failed to put in any evidence whatsoever with respect to what was included in the italicized phrase in the following paragraph:

> "Selling expenses, *including commissions* and advertising and office expenses, including selling administrative expenses."

Some of the defendants employ traveling salesmen on a salary basis; others on a *commission* basis. Others have no

traveling salesmen. Some have exclusive representatives; others have none (Vol. I, pp. 209, 210, 229, 261, 262, 288, 323, 384, 393). Whether the phrase "including commissions" covers *commissions allowed buyers generally, as well as the commissions paid to traveling salesmen who are employed on that basis,* does not appear. Certainly the commissions paid to traveling salesmen would properly be called *"selling expenses."* Commissions allowed to other purchasers would not necessarily be "selling expenses." They would be where a defendant like the Kneeland-Bigelow Company sold flooring through one of its exclusive representatives, who carried the account and who was paid a commission for selling the flooring and carrying the account (Vol. I, p. 393). They would not be *"selling expenses"* for a company like the Cummer-Diggins Company. That company has no traveling salesmen (Vol. I, p. 218), neither has it any representatives of any kind (Vol. I, p. 200). *Yet the company allows commissions* (Vol. I, p. 209). Hence, it cannot be affirmed that "the commission is actually embraced in the estimate of costs."

But what difference would it make if all commissions allowed under any circumstances were actually included in the "average costs"? *We are not concerned with any matter of book-keeping or problem in accounting.* We are concerned with the Government's contention that the "average costs" were actually used as *minimum prices. It therefore makes no difference what elements were included in the average costs.* The question is, *What is the relation between the average costs (regardless of their constituent elements) and the prices obtained by the several defendants?* It is manifest that where a delivered net price is quoted the freight

should be deducted from such price and the result compared with the average cost. *It is also obvious that where a delivered price is quoted subject to a commission of $1.00, $2.00, or $3.00 per thousand feet both the freight and the commission should be deducted from such delivered price. Otherwise we should be dealing with prices which neither the buyers paid nor the sellers received for the flooring in question.*

The Government's assertion that there is no evidence to support our contention that the allowance of commissions is merely a means of meeting competition or reducing prices is not supported by the facts. In the first place, the proposition is self-evident when the various quotations made by members and nonmembers to wholesalers, retailers, and brokers alike is considered. In the second place, there *is* evidence. Mr. Lester N. Godfrey, of the Godfrey Lumber Company of Boston, testified as follows *on cross-examination by the Government:*

> "We dicker with the different manufacturers as to *commissions and prices in order to obtain as low a price as possible* so that we may meet competition. Of course, if a manufacturer gives us a larger commission, his profit would be less. *The purpose of allowing a larger commission is to secure orders,* and the one allowing a *larger commission may underbid the other fellows.* * * * I buy all our flooring outright" (Vol. II, p. 538).

The Government's assertion that commissions are allowed to wholesalers only is inaccurate. Mr. J. L. Colby testified as follows:

> "We sell to both wholesalers and retailers, and allow from $1.50 to $2.00 commission. *We have no set rule that governs commissions.* We use our own judgment and decide whether *a buyer* is entitled to $1.50 or whether he is entitled to $2.00. It depends somewhat upon the volume of business he is turning our way and the length of time he has been soliciting business for our product. Sometimes we quote net instead of allowing any commission. I know of no rule of the present Association with respect to what commissions shall be allowed *or when commissions may be allowed*" * * * (Vol. II, p. 209).

But what if commissions were allowed only to wholesalers? *They are not always allowed to them.* The commissions allowed also vary. Contrary to the Government's contention, the allowance of commissions to wholesalers does not even tend to prove that the average costs were intended to be minimum prices.

On pages 181-2 of the Substitute Brief the Government's statements concerning the District Court's position with respect to the deduction of commissions are misleading. The District Court took the position that if the minimum-price plan or the minimum-price basis permitted the allowance of a commission of $2.00 per M feet the actual minimum price would be $2.00 less than the formal minimum price (Vol. II, p. 855). As pointed out in our Opening Brief, the present Association has never had any rules whatsoever with respect to the allowance of commissions; neither has it had any minimum-price plan or minimum-price basis (pp. 339, 109-112). Hence the reasons relied upon by the District Court do not apply to the sales made by members since the organization of the present Association.

Without giving any citation to the record for the District Court's position, the Government refers to a letter written long previous to the organization of the present Association, and then continues as follows:

> "An examination of all the Weekly Sales Reports for 1922 and 1923 which are printed in the record shows that the following commissions were allowed: 14 of $1.00; 344 of $1.50; 1,244 of $2.00; 3 of $2.50; and 3 of $3.00. The average of these commissions is $1.89, and that undoubtedly represents about the amount included in the average costs for commissions allowed. No average cost figure or price stated otherwise than in even dollars has ever been established, and therefore if the delivered prices less the freight *and less the commission, if any,* are to be compared with the average cost with any pretense of fairness, *two dollars must be deducted from the average cost. As stated by the trial court, therefore, the method actually adopted on the Lewis Exhibit was against the Government.*"

The method used was "against the Government" only upon the hypothesis that the minimum-price plan or the minimum-price basis (which had long since been annulled and abandoned) was still in existence.

In the weekly-sales reports for 1922 and 1923 there were *hundreds of sales made without the allowance of any commissions whatsoever. None of these were included by the Government in arriving at the average commissions of $1.89,* which the Government asserts "undoubtedly represents about the amount included in the average costs for commissions allowed". The foregoing quoted matter is a pure guess,

whereas the average costs are average costs per 1,000 feet of flooring.[2] (See Opening Brief, p. 252.) For instance, if a

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[2] SURVEY OF COSTS.

Manufacturing and Marketing Costs Per 1 M Feet of Flooring Produced During January, February, and March, 1922.

	Per 1 M ft. of flooring produced.
Average of replies received,—	
1. Labor taking lumber off of dock, car, pile or wagon and placing in dry kiln, including expenses of night fireman	$1.16
2. Cost of manufacturing into flooring and putting flooring in warehouse, including twine, oil, belting and other factory supplies, and factory repairs and including manufacturing administrative expenses	8.34
3. Warehouse expense and loading into cars or on wagons.	.90
4. Insurance and taxes. (Divide ¼ of annual amount by quantity of flooring produced during January, February, and March)	1.07
5. Interest at 6 per cent on value of plant and on value of average stock carried of rough flooring lumber and of finished flooring. (Divide ¼ of annual amount by quantity of flooring produced during January, February, and March)	1.92
6. Selling expenses, including commissions and advertising, and office expenses including selling administrative expenses	3.75
7. Cash discount	.80
8. Annual depreciation on flooring plant as is usually allowed by the United States Government. (Divide ¼ of annual amount by quantity of flooring produced during January, February, and March)	1.37
9. Total per M feet	19.31
10. Less net profit from wood and other by-products of flooring lumber, per 1 M feet of flooring produced during January, February, and March	1.32
11. Actual manufacturing and marketing costs per 1 M feet of flooring produced during January, February, and March	17.99

May 31, 1922.

(Vol. I, pp. 99, 104, 107; Vol. III, p. 279.)

member shipped 1,000,000 feet of flooring and paid a commission of $2.00 per M feet on only 500,000 feet, the *average commission* paid on the 1,000,000 feet sold would be only $1.00 per M feet.

Referring to the figures used by the Government in arriving at the so-called average commissions of $1.89, we find that there was a total of 1,608 sales on which commissions paid aggregated $3,034.50, or an average commission on the *1,608 sales* of $1.89 *per sale, and not* per thousand feet on *all* flooring sold. In other words, all sales of flooring—both where commissions were not allowed and where they were allowed—would have to be taken into consideration in order to arrive at the average commission per thousand feet of flooring. The average commissions only on sales where commissions were actually allowed is wholly irrelevant.

The truth of the matter is that Mr. Lewis first selected the true method, but when it was discovered that the results were unfavorable to the Government specious excuses were given for abandoning that method, and fallacious reasons (subject to change without notice) have since been advanced by the Government in support of its obviously unfair and baseless contention that commissions allowed should not be deducted from delivered prices quoted in order to arrive at correct figures with which to compare the average costs.

On page 62 of the Substitute Brief it is said:

> "And it was altogether improper and illegal to furnish the members with the average cost of production and distribution."

Of course the foregoing statement is inaccurate. As heretofore pointed out, each member determined his own costs

as well as his own prices. The announcement of the average costs did not equalize costs which were otherwise different. Neither did it eliminate competition, as is abundantly proved by the undisputed evidence of dealers in all the large centers of consumption. The great price range also proved that each member fixed his prices having in mind his own costs and not the average costs, which were distributed by the Secretary.

On page 63 of the Substitute Brief it is said:

> "Since the average cost was not the actual cost of any member, why furnish any of them with the average costs? How could it be of any use to any member in computing its costs?"

Of course the foregoing questions are beside the case. Each member ascertained his own manufacturing and marketing costs and reported them to the Secretary, who thereupon announced the average. Of course the average could not assist any member in ascertaining or computing his own costs, especially the members who had theretofore ascertained their own costs and reported them to the Secretary. *The information was of great benefit to all the members of the Association because individual costs were compared with average costs which resulted in the reduction of individual costs.* The proof is undisputed that the activities of the Association have resulted in reduced costs of production. (See Opening Brief, pp. 266-271.) That the Association has been able to reduce costs is also proved by the fact that prices charged by the Association members are usually lower than the prices of nonmembers, although Association flooring is superior to the flooring manufactured by nonmembers. (See Opening Brief, pp. 116-143.)

The Government does not allege in its Petition that the average costs were not honestly and accurately ascertained. All that is charged in the Government's Petition with respect to ascertainment of average costs was that the average costs "now represent all possible elements of actual costs, and also large profits to the defendant corporations." (See p. 8, Opening Brief.) *The Government offered no proof whatsoever that the average costs contained any profit or that any element of the average costs was improper. The proof was undisputed that the average costs were honestly and accurately made.* In view of the foregoing facts, it is too late for the Government to attack, by means of innuendo and interrogation, the average costs announced by the Association. In its latest brief the Government attempts to question the distribution of the average costs by the Secretary. *There is no proof whatsoever as to what method the Secretary used in making the distribution in question.* As pointed out in our Reply Brief, the distribution of average costs is immaterial in view of the undisputed proof that each member ascertained his own costs; that each member fixed his own prices, and that there was no agreement, either express or implied, that flooring should be sold at average costs. The wide range of prices completely refutes any such theory.

On page 3 of the Government's Substitute Reply Brief it is stated:

> "As is customary in this character of case, an effort is made to show that the industry involved is not important in comparison with others; that it is hedged about with competition which threatens its destruction, and can be saved only by drastic and concerted action by those engaged therein." * * *

No such contentions have ever been made by the appellants.

Control of Industry.

On page 4 of the Substitute Brief it is stated that the Maple Flooring Manufacturers Association was organized in 1905. This is not the fact. In paragraph V of the Government's Petition it is alleged that "the defendant Association has been in existence since 1895" (Tr., 4). The evidence shows that the first Maple Flooring Manufacturers Association was organized in 1897, and that in 1898 the Association then in existence "represented about 90 per cent of the supply of maple flooring" (Vol. IV, p. 827).

On page 5 of the Substitute Brief it is stated:

> "The fact is that it [the maple flooring industry] is an industry which nature has practically confined to Michigan and Wisconsin; and it is dominated by appellants, acting through their Association."

This statement is absurd in view of the undisputed proof that both in manufacturing capacity and in numbers the nonmembers greatly exceed the members of the defendant Association. The nonmembers are located in the New England States, in New York, in Pennsylvania, Minnesota, Illinois, Ohio, Kentucky, Tennessee, West Virginia, North Carolina, and Arkansas, as well as in Michigan and Wisconsin. The timber is widely distributed. (See pp. 24-36 of Appellants' Opening Brief.) The entire membership of the present Association numbers only 22; and, as shown on pages 5-7 of the Appellants' Reply Brief, there are in Michigan, Illinois, Wisconsin and Minnesota alone 17 nonmember

manufacturers of maple, beech, and birch flooring. Besides the Canadian manufacturers there are more than 400 manufacturers of rough maple lumber in the States of Michigan and Wisconsin alone, and some 3,000 of such manufacturers in the United States. In view of the foregoing facts and the undisputed proof that the members of the defendant Association own less than 2 per cent of the stand of maple, beech, and birch timber in the United States and less than 4 per cent in the Lake States, it is manifestly erroneous to assert that the maple-flooring industry is dominated by appellants.

If, as asserted by the Government, the defendant Association has had a continuous existence since its organization in 1897, then it has lost ground, even if it be true that it now manufactures about 70 per cent of the flooring produced in the United States. It formerly produced 90 per cent of the maple flooring manufactured in the United States (Vol. IV, p. 827).

Abandonment of Allotments.

On page 19 of the Substitute Brief it is said:

> "Therefore, if in fact the collection and paying out of the allotment fund ceased on March 1, 1920, defendants deserve no credit so far as this proceeding is concerned, as it was not done that their conduct might conform to the law; but it was a mere temporary suspension arising out of the general conditions of the lumber business."

The foregoing statement is demonstrably inaccurate. The undisputed proof is that the allotment plan then in force and all statistical activities were suspended by the Association

then in existence *upon advice of counsel, because of the decision by the District Court in the Hardwood Case. The allotment plan was never thereafter resumed* (Vol. III, p. 130; Vol. IV, pp. 447-449; Vol. I, pp. 77-78, 76, 146, 143-144, 165; Vol. II, p. 794).

Previous Activities.

In the Government's Substitute Brief much emphasis is placed upon the activities of previous associations for the purpose of prejudicing the present Association, which was organized on March 29, 1922. The Government apparently assumes that if it can convict some of the defendants of prior unlawful acts, or of merely an intention to violate the law anterior to the formation of the present Association, that such intention will be presumed to continue and will of itself render unlawful what otherwise would be lawful. Of course such a theory is unsound. The question for this Court to determine is: "Does the proof show an unreasonable restraint of interstate trade or commerce? In considering this question, the Court is confined to the allegations of the Government's Petition. In other words, the question is: *Has the Government proved the existence of the unreasonable restraint of interstate trade or commerce alleged in its Petition?*

The proof is clear that the practices of the different associations have been constantly changing. In other words, there has been a more or less orderly evolution of Association methods from 1897 to the formation of the present Association on March 29, 1922. The insistence of the Government upon the practices of previous associations demonstrates a weakness and expresses a hope. The argument is

that what is being done today is bad or unlawful because unlawful things were done some two or three years or decades before the organization of the present Association. In other words, that there is no such thing as evolution, but that what a thing was in the beginning it will be to the end of time. The same argument would utterly discredit the science of astronomy for the reason that it grows out of astrology. The same argument could also discredit the science and art of modern medicine because they have their source in the beliefs and practices of the ancient medicine man who resorted to amulets and incantations in order to exorcise supposedly evil spirits. The modern chemist is also merely the successor of the medieval alchemist. The proof in the case at bar demonstrates that the practices of the present Association are fundamentally different from the practices of previous associations, and that the present Association was organized in a *bona fide* effort to comply with the law. The Government apparently hopes to confuse the issues by continually harping upon the practices of previous associations. The weakness of the Government's case is strikingly demonstrated by the utter absence of documentary proof of unlawful conduct or intention subsequent to the organization of the present Association. In order to support its contentions as to the illegality of the present Association, the Government is forced to rely almost exclusively upon documentary evidence antedating the organization of the present Association.

The Law.

On page 214 of the Substitute Brief appear the following words—words, words!

> "It is believed that no principles of law can be better settled than those which control the questions involved in this case; and that to refuse to apply them to the facts proven in this record would be in effect to overrule the previous decisions of this Court, and to license trade associations to engage in every practice which they pretend is adopted as a reasonable regulation to promote the general welfare, regardless of how it may effect production and prices, and how oppressive it may be upon the public."

Not at all. This case has nothing to do with what trade associations may or may not do. The question presented by the record in the case at bar is a question of *fact,* viz., *Does the proof show an existing unreasonable restraint of interstate trade or commerce?*

And if the public has been oppressed, it is strange that the Government could find no one to testify to the fact!

With respect to prices, the undisputed proof is that they are now and have always been fair and reasonable.

With respect to production, there is not a scintilla of evidence that production has been curtailed.

The proof is also undisputed that the articles of association (the contract) do not undertake to control either prices or production. Each member is left perfectly free to produce as much or as little flooring as he pleases, and to sell it for as much or as little as he pleases.

Buyers generally prefer to deal with Association members, and all witnesses—including those produced by the Government—testified that competition among the defendants was strong, active and vigorous.

The Government finally falls back upon the defendants' plan. Can the *plan* be so obnoxious, in view of the foregoing results?

Moreover, the Antitrust Act does not concern itself with the *form* of any contract or combination. *The Antitrust Act does not condemn any contract or combination for the distribution of trade statistics.* This Court has no jurisdiction to declare unlawful any contract or combination for the distribution of trade statistics, *except where such contract or combination has caused, or where the Court is reasonably certain that it will necessarily cause, an unreasonable restraint of interstate trade or commerce.*

A contract or plan for the distribution of trade statistics is entirely a matter of *form*. The Antitrust Act concerns itself solely with *content—or, rather, with the effect of the contract or combination upon interstate trade or commerce. The Antitrust Act does not concern itself with whether a contract or combination is old or new. The effect upon interstate trade or commerce is the thing.*

We are fairly familiar with the histories of the common law, the Roman law, and the laws of the leading countries of continental Europe. During a busy practice we have endeavored to familiarize ourselves with the leading writers on theoretical and analytical jurisprudence and philosophy of law. But never yet have we come across any system of law where contracts were divided into *natural, unnatural, normal, old* or *new*. Counsel for the Government are simply attempting to exalt into fundamental principles a few unguarded and (we respectfully submit) manifestly unsound *dicta* which have crept into certain opinions written by members of this Court.

Of course the Roman jurists believed in natural law as opposed to positive law. So did certain medieval and 18th century theorists. But the natural law school is as obsolete

as trial by battle, and as dead as the dodo, so far as modern jurisprudence is concerned. Moreover, there can of necessity be no *natural* contracts, combinations or conspiracies. They must be entered into by personæ. They must be either lawful or unlawful, and whether they are either can not be determined by their "normality" or "newness." So far as this case is concerned, the legality of the contract or combination must be determined by the Antitrust Act, which inhibits only contracts, combinations and conspiracies which unreasonably restrain interstate trade or commerce.

We submit that the decree of the lower Court should be reversed with directions to dismiss the Government's bill.

Respectfully,

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